

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

AARON GIBSON

Plaintiff,

v.

Civil Action No. 5:09CV85
(STAMP)

S. FRAME and E. DICKERSON,

Defendants.

MEMORANDUM OPINION AND ORDER
AFFIRMING AND ADOPTING MAGISTRATE
JUDGE'S REPORT AND RECOMMENDATION

I. Background

The plaintiff, Aaron Gibson, proceeding pro se¹ and in forma pauperis,² filed a complaint on July 22, 2009, challenging the constitutionality of a prison disciplinary proceeding. The case was referred to United States Magistrate Judge John S. Kaul for initial review and recommendation pursuant to Local Rule of Prisoner Litigation Procedure 83.01 et seq. and 28 U.S.C. §§ 1915(e) and 1915A.

The plaintiff alleges that the disciplinary proceeding he challenges resulted in four sanctions: (1) ninety days loss of phone privileges; (2) ninety days loss of commissary; and (3)

¹"Pro se" describes a person who represents himself in a court proceeding without the assistance of a lawyer. Black's Law Dictionary 1341 (9th ed. 2009).

²"In forma pauperis" describes the permission granted to a poor person to proceed without liability for court fees or costs. Black's Law Dictionary 849 (9th ed. 2009).

ninety days loss of visitation privileges; and (4) twenty-seven days loss of good time. The plaintiff believes that he incorrectly pursued a civil rights action and should have proceeded pursuant to a writ of habeas corpus under 28 U.S.C. § 2241. On August 4, 2009, the plaintiff filed a motion to withdraw without prejudice in order to pursue the writ of habeas corpus pursuant to 28 U.S.C. § 2241.

The magistrate judge issued a report and recommendation recommending that the plaintiff's motion to withdraw without prejudice be granted and that this case be dismissed without prejudice. The magistrate judge advised the parties that, pursuant to 28 U.S.C. § 636(b)(1)(C), any party may file written objections to his proposed findings and recommendations within ten days after being served with a copy of the magistrate judge's recommendation. The parties filed no objections. For the reasons set forth below, this Court affirms and adopts the magistrate judge's report and recommendation, as submitted and without objection.

II. Applicable Law

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. However, failure to file objections to the magistrate judge's proposed findings and recommendations permits the district court to review the recommendation under the standards that the district court believes are appropriate and, under these circumstances, the parties' right

to de novo review is waived. See Webb v. Califano, 468 F. Supp. 825 (E.D. Cal. 1979). Here, no party filed objections. Accordingly, this Court reviews the report and recommendation of the magistrate judge for clear error.

III. Discussion

The magistrate judge, in his report and recommendation, recommended that the plaintiff's motion to withdraw without prejudice be granted and that this case be dismissed without prejudice. A § 2241 motion is used to attack the manner in which a sentence is executed. See Preiser v. Rodriguez, 411 U.S. 475, 499-500 (1973). This Court, therefore, agrees with the magistrate judge, that because the plaintiff lost good time credit as a result of the challenged disciplinary proceeding, the plaintiff should have filed a writ of habeas corpus pursuant to 28 U.S.C. § 2241, rather than a civil rights action. Accordingly, the plaintiff's motion to withdraw without prejudice is hereby GRANTED and this case is DISMISSED WITHOUT PREJUDICE.

IV. Conclusion

For the reasons set forth above, this Court finds that the magistrate judge's recommendation is not clearly erroneous and hereby AFFIRMS and ADOPTS the report and recommendation of the magistrate judge. The plaintiff's motion to withdraw is GRANTED. Accordingly, it is ORDERED that this case be DISMISSED WITHOUT PREJUDICE and STRICKEN from the active docket of this Court.

Under Wright v. Collins, 766 F.2d 841, 845 (4th Cir. 1985), the petitioner's failure to object to the magistrate judge's proposed findings and recommendation bars the petitioner from appealing the judgment of this Court as to the matters addressed in the magistrate judge's report and recommendation.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to the pro se plaintiff by certified mail and to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: October 2, 2009

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE